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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF THE AMERICAN LEGION AS AMICUS CURIAE IN SUPPORT OF JURISDICTION

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* MITCHELL ROGOVIN
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON

ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, D.C. 20036

* Counsel of Record

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BRIEF OF THE AMERICAN LEGION AS AMICUS CURIAE IN SUPPORT OF JURISDICTION

INTEREST OF AMICUS CURIAE [1]

The American Legion, chartered by Special Act of Congress in 1919, Pub. L. No. 66-47, 41 Stat. 284, is the largest organization of veterans in the United States. Its membership, as set forth in that statute and amended from time to time by the Congress, *see generally* 36 U.S.C. §§ 41-51, is restricted to those who have served in the military services during World Wars I or II, or the Korean or Vietnam conflicts, provided that they were honorably discharged or separated, or continued to serve honorably, 36 U.S.C. § 45. In addition to its 2,400,000 members, the Legion is made up of 15,800 posts located in states across the country and in seven foreign countries.[2]

[1] Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters of consent have been filed with the Clerk.

[2] In compliance with Supreme Court Rule 28.1, the Legion states that its 15,800 affiliated posts and 58 Departments (seven of which are in foreign countries) all bear the words "American Legion" in

The Legion and its subsidiaries are exempt from federal income taxation under § 501(c)(19) of the Internal Revenue Code of 1954 (as amended), 26 U.S.C. § 501(c)(19),[3] and contributions to the Legion are deductible for income tax purposes under § 170 and for gift and estate tax purposes under §§ 2522 and 2055 of the Code. 26 U.S.C. §§ 170, 2055, 2522. The Legion has a legislative program relating to specified issues of direct interest to its members, and receives a small portion of its income from deductible bequests or contributions.

In its *en banc* decision, the Court of Appeals recognized that its ruling vitally affected the interests of veterans groups. After concluding that there was a constitutionally objectionable "differential" in tax treatment of § 501(c)(3) organizations and veterans organizations, the Court of Appeals concluded that "[t]he most obvious remedy—striking down the Section 501(c)(3) lobbying limitation that now governs Taxation [appellee]—poses the most obvious problems," App. 73a,[4] and therefore remanded the case to the District Court with a strong suggestion that "the preferential treatment now accorded the lobbying of veterans' organizations" be eliminated. App. 76a.

If this Court were to affirm the Court of Appeals' conclusion that any disparity in treatment between veterans groups and other non-profit organizations is in fact unconstitutional, or its suggested remedy, it is plain that

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their titles. The American Legion also recognizes as an auxiliary organization "The American Legion Auxiliary," an Indiana corporation. The Legion has no parents, subsidiaries or affiliates other than as set forth above.

[3] Prior to the enactment of § 501(c)(19), the Legion was recognized as tax exempt under § 501(c)(4). Since 1921, contributions to the Legion and its posts and auxiliaries have been deductible from the taxable income of the contributors. Pub. L. No. 67-98, § 214(a)(11), 42 Stat. 227, 241 (1921).

[4] Citations to the decision of the Court below, reprinted in the Appendix to the Government's Jurisdictional Statement, are cited as "App. ——."

the Legion's current tax status and freedom from restraint as to legislative activity would be substantially and seriously impaired. Amicus thus has a vital interest in the disposition of this case.

SUMMARY OF ARGUMENT

I. Tax code classifications subject to equal protection challenge will generally be sustained if they rationally further a legitimate purpose. Under this standard, the numerous differences in treatment under the Internal Revenue Code between veterans organizations and other exempt organizations, including restrictions on lobbying activity, plainly pass constitutional muster. The predicate for the Court of Appeals' contrary holding was a simple misreading of the legislative history concerning lobbying restrictions on § 501(c)(3) organizations, which shows that Congress deliberately limited the lobbying restrictions to those organizations. And the Court of Appeals' erroneous conclusion that traditional equal protection scrutiny will not suffice here is inconsistent with this Court's decisions that government subsidies affecting fundamental rights need not meet the "compelling interest" test.

Even a more rigorous review of this classification will show that veterans organizations do not pose the kinds of dangers with which Congress was concerned in imposing lobbying restrictions on § 501(c)(3) organizations. The major veterans organizations, like the American Legion, are congressionally chartered and subject to special audit and reporting requirements. Such organizations tend to have controls assuring that constituent members' views are fairly represented and, unlike many § 501(c)(3) organizations, do not depend heavily for their financial support on contributions from a floating general public. Thus, a substantial basis exists for concluding that the special dangers posed by § 501(c)(3) organizations engaging in lobbying—to wit, private interest lobbying by wealthy individuals who, by virtue of substantial deductible contributions, could control small § 501(c)(3)

organizations lacking effective membership control—were not present in lobbying by veterans organizations. Regardless of whether the standard of review is a mere rationality standard, or something more rigorous, no equal protection violation is present.

II. The remedial order of the Court of Appeals was, in any event, erroneous. This case was brought under § 7428 of the Internal Revenue Code, which limits the relief that a district court may grant to a declaratory judgment whether the Service's denial of an application for § 501(c)(3) status was proper. If the legislative scheme *were* unconstitutional, respondent would simply have been entitled to a declaratory judgment that the Secretary had wrongly denied its application for § 501(c)(3) status. It would then be left to Congress to determine whether it wished to remedy the statute by eliminating the § 501(c)(3) lobbying restrictions, by extending restrictions to veterans organizations, or through some other means. The Court of Appeals' remand order suffers a constitutional defect as well, since it amounts to a virtual command that the District Court ignore the constitutional limitations on its authority, invade the prerogatives of the legislative branch, and engage in the kind of policy judgments that are preeminently legislative tasks.

I. THE COURT BELOW ERRED IN HOLDING THAT THE LOBBYING RESTRICTIONS IN § 501(c)(3) VIOLATE THE EQUAL PROTECTION CLAUSE.

A. The Court Of Appeals Erred In Holding That These Tax Classifications Could Be Sustained Only By A Compelling Government Interest.

This Court has consistently held that legislative classifications in the tax code normally will be sustained against equal protection challenge if such classifications bear a rational relationship to a legitimate governmental purpose. *E.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-41 (1973); *United States v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6

(1970); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Rogers v. County of Hennepin*, 240 U.S. 184, 192 (1916). The Court of Appeals suggested that Congress' failure to apply the same lobbying restrictions to § 501(c)(3) and veterans organizations was not only inexplicable, but probably even inadvertent, and thus could not pass muster even under the "rationality" test. This was a complete misreading of the legislative history.

Prior to 1934, there were no statutory limitations on the lobbying activities of any exempt organizations.[5] In the floor debate surrounding the enactment of the first such restrictions it was noted that:

> the attention of the Senate [Finance] committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop that . . .

78 Cong. Rec. 5959 (1934). A number of Senators felt the amendment should reach all deductible contributions, *id.* at 5861, but others were concerned lest the amendment be drawn too broadly to cover organizations not "acting from selfish motives" where there was less danger that the organization would simply "advance the personal interest of the giver of the money." *Id.* As a result, the lobbying restriction was enacted without change. Since the precise question of an extension of the restriction was considered and rejected, it can only be concluded that Congress acted intentionally not to apply the restrictions to all such organizations.

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[5] Revenue regulations took the position that the requirement that an exempt entity be organized and operated *exclusively* for exempt purposes totally precluded political activity. 2 Cum. Bull. 152, 154 (1920). However, in *Slee v. Comm'r*, 42 F.2d 184, 185 (2d Cir. 1930), the court left room for some "agitation" which "is ancillary to the end in chief." The 1934 amendment, discussed in text, has been regarded as codifying this formulation.

Congress has recently reexamined and adhered to this decision. In 1976, following several years of hearings, Congress enacted § 501(h) of the tax code, 26 U.S.C. § 501(h). Rather than adopting proposals to substantially eliminate the lobbying restrictions on § 501(c)(3) organizations, Congress decided to retain but liberalize the restrictions by permitting most § 501(c)(3) organizations to elect to expend up to specified percentages of their budget on lobbying.[6] During the same time frame, moreover, Congress created a specific statutory exemption for veterans organizations, § 501(c)(19), in order to exempt such organizations from "unrelated business income tax" on income received from bona fide members insurance programs. Congress specifically indicated, however, that such sheltered income could not be used for "lobbying." S. Rep. No. 1082, 92d Cong., 2d Sess. 5 (1972).

Congress has thus acted deliberately over nearly half a century to regulate the flow of tax-deductible dollars through exempt organizations for lobbying purposes, focusing particularly on § 501(c)(3) organizations where the danger for large-scale abuse seemed greatest, and imposing a variety of restrictions on other exempt organizations in response to particular needs and problems. Especially under traditional analysis, the Equal Protection Clause permits the Government to regulate "one step at a time," addressing itself to "the phase of the problem which seems acute." *Buckley v. Valeo*, 424 U.S. 1, 105 (1976), *quoting Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955). Even if the Government focuses upon "'one phase of one field and [applies] a remedy there,

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[6] *See generally Influencing Legislation By Public Charities, Hearing Before the House Ways and Means Comm.*, 94th Cong., 2d Sess. 61 (1976) [hereinafter cited as "Hearings 1976"]; *General Tax Reform, Hearings Before the House Ways and Means Comm.*, 93d Cong., 1st Sess. (1973) [hereinafter cited as "Hearings 1973"]; *Legislative Activity By Certain Types of Exempt Orgs., Hearings Before the House Ways and Means Comm.*, 92d Cong., 2d Sess. (1972) [hereinafter cited as "Hearings 1972"].

neglecting the others' . . . [s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems . . . are not subject to a constitutional straitjacket." *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *see also Clements v. Fashing*, 50 U.S.L.W. 4869 (U.S. June 25, 1982).

A majority of the Court below, while conceding that the unavailability of the benefits of § 501(c)(3) status to appellee does not impose a direct burden on appellee's First Amendment rights but only "involves unequal levels of governmental subsidy of First Amendment rights," App. 39a, nevertheless held that a strict level of scrutiny should be applied and that the distinctions drawn by § 501(c)(3) could be sustained only if they served a "substantial governmental interest [and were] . . . narrowly tailored to serve that end." *Id.* at 45a. That conclusion was plainly erroneous. This Court has on a number of occasions in recent years ruled that differing levels of governmental subsidy or benefits relating to the exercise of fundamental rights need not be subject to strict scrutiny under the Equal Protection Clause.

For example, in *Maher v. Roe*, 432 U.S. 464 (1977), the Court had to determine whether the withholding of government benefits from women who chose to exercise the fundamental right to a first trimester abortion warranted close judicial scrutiny. The Court concluded that it was "abundantly clear that . . . [the government] is not required to show a compelling interest for its policy choice to favor . . . [one permissible activity] any more than [it] must so justify its election to fund public but not private education. *Id.* at 478. *See also Harris v. McCrae*, 448 U.S. 297 (1980); *San Antonio Independent School District v. Rodriguez, supra*; *Cammarano v. United States*, 358 U.S. 498 (1959). As this Court held in considering an equal protection challenge to denial of public financing to some presidential candidates but not others, since the discrimination involved there was limited to "denial of the enhancement of opportunity to communicate with the electorate that the [statute] afford[s] eligi-

ble candidates," *Buckley v. Valeo*, 424 U.S. at 95, it was not required to be sustained by a compelling state interest. *A fortiori*, in this case, where the discrimination complained of is the Government's failure to provide an indirect subsidy by offering tax benefits to prospective donors, the standard of strict scrutiny must be rejected.[7]

B. Even Under A More Rigorous Standard Of Review, The Distinction Between Veterans Organizations And § 501(c)(3) Organizations Should Be Sustained.

Even if the Court of Appeals was correct in applying some degree of heightened scrutiny, the difference in treatment involved here is justified because (1) the lobbying restriction on § 501(c)(3) organizations reflects a strong governmental policy to guard against the wholesale use of deductible contributions for lobbying purposes, and (2) Congress legislated in a reasonably narrow and tailored manner, since the dangers Congress perceived in § 501(c)(3) organizations' lobbying are not posed to the same degree by veterans organizations.

The permissible purposes for which a § 501(c)(3) organization may be established are broad indeed, the number of such groups is large, and the reporting and disclosure requirements imposed on such organizations are minimal. Congress concluded that, in order to prevent such groups from functioning as mere conduits for the use of tax-deductible funds for lobbying to "advance the personal interests" of a few wealthy givers, lobbying restrictions were necessary. Both this Court and the lower federal courts have recognized Congress' "sharply defined national policy" to guard against the use of substantial

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[7] A very wide range of government programs provide subsidies or benefits, direct or indirect, that enhance the opportunities of one group as opposed to another in the exercise of important constitutional rights. If each of these governmental classifications must be justified under a "compelling interest" test, the courts would be faced with the detailed review of a staggering array of legislation. Nowhere is this more aptly illustrated than in the instant case; the tax code's treatment of exempt organizations alone reflects a complex pattern of historical legislative judgments.

tax-deductible funds for lobbying activities. *Cammarano v. United States, supra*, 358 U.S. at 508; *accord, Haswell v. United States*, 500 F.2d 1133, 1150 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) ("[C]ongressional interest in prevention of the use of tax funds to support lobbying is compelling").

The history of Congress' recent decision to mitigate the lobbying restrictions on § 501(c)(3) organizations demonstrates its particularized concerns about the dangers such organizations might pose to this important governmental policy absent such restrictions: that, due to their potentially flexible membership and loose internal regulations,[8] and the lack of functional reporting requirements imposed upon them,[9] these organizations were likely to become conduits for the advancement of the interests of wealthy contributors[10] and to front lobbyists

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[8] Hearings 1972, *supra* note 6, at 9 (remarks of Edwin Cohen, Ass't Sec'y for Tax Policy, Dept. of the Treasury; difficulty of defining membership of § 501(c)(3) organization); *id.* at 78-79 (remarks of Rep. Waggonner; looseness of membership criteria and lax internal review procedures of § 501(c)(3)s).

[9] *See* Hearings 1972, *supra* note 6, at 9 (remarks of Edwin Cohen; noting laxity of disclosure requirements on lobbying by § 501(c)(3)s); Hearings 1976, *supra* note 6, at 15 (remarks of Rep. Schneebeli and William M. Goldstein, Dep. Ass't Sec'y of the Treasury; need for disclosure requirements for § 501(c)(3)s); *id.* at 46 (statement of Mortimer M. Caplin, Esq.; § 501(h) would improve "monitoring the legislative efforts of public charities").

[10] Thus the ABA Section on Taxation stated in its recommendation to Congress that:

> Since the charitable deduction means more to the rich than the poor and the former have more money anyway to give away to charity, . . . permitting deductible charitable contributions to be used for lobbying purposes may extend the legislative influence of the rich as opposed to the poor. Finally, particular taxpayers may not want the tax exempt funds of a charity to be used to support particular legislation of which they disapprove.

Hearings, 1972, *supra* note 6, at 171; Hearings 1976 at 18 (Rep. Duncan: fear that § 501(h) "written for a few special groups").

whose statements "really represen[t] their own views rather than the people they profess to represent." [11]

That Congress did not perceive similar dangers in the operation of veterans organizations is hardly surprising, since such organizations are relatively fewer in number, were formed for specific and limited purposes, typically have well-defined membership and tight internal controls on lobbying activities, and, where federally chartered, are also subject to special annual audit requirements.[12] The nature and activities of the American Legion, the largest of all veterans organizations in membership, amply bear out this judgment. The Legion was formed by returning World War I veterans to promote the interests of veterans, particularly disabled veterans or others disadvantaged by their military service, and widows and orphans of those who had died in World War I. Its congressional charter, 36 U.S.C. §§ 41-51, specifically enumerates its organizational powers and purposes, and can be revised by Congress at any time. Thus, by contrast to most § 501(c)(3) organizations, the Legion has purposes that are specified and limited by Congress, and subject to its direct review.[13]

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[11] Hearings 1973, *supra* note 6, at 1496; *see* Hearings 1972, at 80-82 (remarks of Rep. Waggonner) (fear of representatives speaking without regard for "people back home"; involvement in "democratic process" through lobbying requires "democratic" representation of membership by § 501(c)(3)s).

[12] *Proposals for Administrative Changes in Internal Revenue Service Proceedings, Hearings before the Subcomm. on Oversight of the House Ways and Means Comm.*, 94th Cong., 1st Sess. (1975) [hereinafter "Hearings 1975"] at 133-34; (ABA report on effects of § 501(c)(3) status determination; veterans groups and other tax-exempt organizations distinguished from § 501(c)(3)s in that "contributions" to [the former] type of organization are typically made by a membership group which is likely to continue to support the organization even if a question is raised as to its [deductible] status").

[13] Moreover, Congress is in a particularly good position to scrutinize the sources of the Legion's funds and the uses to which they are put since, by law, the Legion must annually submit to Congress

Contrary to the suggestion in the Court of Appeals' opinion, App. 23a, the Legion does not pose the problems of an organization aggressively using tax-deductible money for lobbying. The Legion receives a negligible proportion of its budget from deductible contributions. Its principal source of funds is the payment of modest nondeductible annual dues by each of its 2,400,000 members. Other substantial sources of income include emblem sales income, advertising income from The American Legion Magazine, investment income, and income derived from its group term life insurance plan, the American Legion Life Insurance Plan.[14]

Similarly, only a small percentage of the Legion's funds —less than the ceiling imposed on a § 501(c)(3) organization under § 501(h)—are used for lobbying activities. In fact, of the Legion's 1982 budget approximating $23 million, only $314,284 is allocable to the legislative division, much of it for employee salaries and benefits—and a substantial part of the activities of this division involve responding to specific requests from congressional committees for testimony by Legion representatives. *Cf.* 26 U.S.C. § 501(h)(2)(A); 26 U.S.C. § 4911(d)(2)(B)

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a report of its proceedings for the preceding year, and an audit of accounts conducted by an independent accounting firm. 36 U.S.C. §§ 49, 1101-1103. And, of course, Congress is in a position to be knowledgeable concerning veterans' lobbying since it is primarily before Congress that such groups lobby.

[14] The Legion has a policy of not permitting the solicitation *or acceptance* of any contributions, including charitable contributions, without the specific consent of its National Executive Committee. Ordinarily, the Legion does not solicit contributions at the national level for its *own* purposes. It has, however, on a number of occasions conducted solicitations from among its members for tax-deductible contributions *to be given to others* for public or quasi-public purposes.

For example, the Legion has raised over $1.2 million in deductible contributions from its members for the Vietnam War Memorial on the Mall; $500,000 for the Bicentennial, which it gave the Government for production of a replica of the Freedom Bell; and in the past raised over $1 million for the Cancer Foundation.

("lobbying expenditures" do not include providing technical assistance in response to a request from a governmental body).

Congress' concern that organizational lobbyists would not in fact represent the views of large, but loosely organized memberships in the § 501(c)(3) context, is similarly inapplicable to veterans organizations. The American Legion will neither testify nor lobby unless its membership has, at an annual convention, formally adopted a specific resolution on the subject matter in question. This requirement is rigorously adhered to in order to assure that it is the views and interests of the Legion's members, and not simply those of a few leaders or contributors, that are communicated to the Congress.[15]

Finally, Congress was undoubtedly aware, as even the Court of Appeals recognized, that there are approximately *fifteen* times as many § 501(c)(3) organizations as veterans organizations and, more important, in 1978, contributions, gifts and grants to all § 501(c)(3) organizations totalled about $22 billion, nearly 1500 times the $16.7 million given to veterans organizations in that year. App. 73a. This substantial disparity, when viewed in combination with the special characteristics of veterans organizations, demonstrates convincingly why Congress saw no need to extend special lobbying restrictions to veterans groups.[16]

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[15] Membership approval is a significant factor because veterans are a large and substantial group, cutting across racial, political and geographic lines, lines of wealth and other criteria suspect under the First Amendment. Moreover, under its charter and national constitution, the Legion is absolutely prohibited from involvement in electoral politics.

[16] Both this Court and the Court of Appeals previously denied motions by the Legion to intervene as a party. If this Court were to conclude that a remand was necessary to explore veterans organizations' characteristics, amicus would, if permitted, make a proffer of proof in the District Court to establish the facts set forth above.

II. THE REMAND ORDERED BY THE COURT OF APPEALS PRESENTS SUBSTANTIAL STATUTORY AND CONSTITUTIONAL QUESTIONS.

This action was filed pursuant to § 7428 of the Internal Revenue Code, 26 U.S.C. § 7428. This special jurisdictional statute was enacted in 1976 to carve out a very narrow exception to the general rule, embodied in both the Anti-Injunction Act, 26 U.S.C. § 7421(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201, that taxpayers can only challenge the Internal Revenue Service's treatment of them in a suit for refund in the District Court or Court of Claims, or in the Tax Court after the Commissioner has assessed a deficiency. The Court of Appeals' remand order here is inconsistent with Congress' purpose in that statute to impose narrow limitations on the federal courts' exercise of jurisdiction pursuant thereto, and thus raises an important issue for this Court's review.

Section 7428 is an unusual example of congressional qualification of federal court jurisdiction. A complaint may be filed "only by the organization the qualification or classification of which is at issue," and must relate to a "determination" by the Service relating to that organization's "initial . . . or continuing qualification" under § 501(c)(3). 26 U.S.C. § 7428(b)(1). Most important for these purposes, Congress set forth with great precision the nature of the "remedy" it was authorizing: "[U]pon the filing of an appropriate pleading, . . . the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification. . . ." 26 U.S.C. § 7428(a)(2). The plain language of this statute thus indicates that Congress contemplated that, if a plaintiff prevailed in its challenge to the denial of an exemption, the court would simply issue a declaratory judgment that the Service had acted improperly.

The legislative history likewise supports the conclusion that the remedial jurisdiction of the district court under

§ 7428 is very limited. Congress sought to address a particular problem in this legislation—to wit, the inability of nonprofit organizations claiming to be entitled to § 501(c)(3) status to survive without deductible contributions in the event that such status was denied or revoked. Under the general limitations applicable to taxpayer litigation with the Service, the organization's only remedy was lengthy refund litigation in the Court of Claims or District Court, or a deficiency protest in the Tax Court. Such litigation left the organization's status as a recipient of deductible contributions in jeopardy, for contributions might simply dry up or the organization might never raise enough income to incur a tax liability permitting it to litigate the question. *See Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974); *Bob Jones University v. Simon*, 416 U.S. 725 (1974).

The expedited review procedure made available to § 501(c)(3) organizations in § 7428 constituted congressional recognition of these unique problems faced by such organizations. But Congress sought to limit the potential disruptiveness of such suits to the orderly administration of the tax code;[17] the intent of the law was simply to permit § 501(c)(3) organizations to obtain judicial review of their entitlement to exempt status in advance of incurring tax liability. So, with regard to remedies, the successful taxpayer in a § 7428 case—instead of obtaining a refund, or removing a deficiency notice—would obtain a declaratory judgment that it was entitled to exempt status.

The relief contemplated by the Court of Appeals here is far afield from that which Congress and the courts[18]

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[17] Thus, it specifically rejected proposals to permit district courts to issue injunctive relief, *see* Hearings 1975, *supra* note 12, at 126 (testimony of Alan Morrison) and adopted the ABA's recommendation that *only* § 501(c)(3), and *not* other § 501(c) organizations, be permitted to take advantage of this expedited procedure. Tax Section Recommendation No. 1974-17, *reprinted in* Hearings 1975 at 133-34.

[18] Until now, the federal courts have recognized congressional intent that § 7428 not interfere with the administration of the tax

have understood was intended under § 7428. Instead of making a determination as to whether the Service's denial of TWRW's application was correct, or should be set aside because the provision upon which it was based was unconstitutional, the Court below directed the District Court to consider issuing limitations on other taxpayers, contemplating a wholesale revision of the Service's administration of §§ 501(c)(4), 501(c)(19), and 170 insofar as they apply to veterans organizations. This is a tremendous distortion of the nature of the remedial process Congress contemplated in this statute.[19] *Cf.* S. Rep. No. 938, 94th Cong., 2d Sess., 588 (1976) (judgments under § 7428 "to be binding upon the parties to the case").

The remand order, moreover, poses problems going beyond the question of statutory interpretation. As the Government noted in its Jurisdictional Statement, the Court of Appeals seems to contemplate that the District Court should engage in precisely the kind of legislative hearing and policy determination reserved to Congress.

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code by any radical expansion of the procedures normally available to litigants against the Service, *see e.g., Southwest Virginia Professional Standards Review Org., Inc. v. United States*, 78-2 U.S.T.C. ¶ 9747 (D.D.C. 1978) (adopting Tax Court Rules limiting scope of *de novo* review); *Virginia Professional Standards Review Found. v. Blumenthal*, 466 F. Supp. 1164 (D.D.C. 1979) (conforming to Tax Court Rules regarding scope of review), and have also been rigorous in adhering to the substantive limitations on the subject matter of cases that may be brought under § 7428, *see, e.g., CREATE, Inc. v. Comm'r*, 634 F.2d 803 (5th Cir. 1981) (no jurisdiction under § 7428 to review adverse determination concerning applicability of percentage limitation to contributions to taxpayer). *See also* note 19, *infra*.

[19] The type of remedial order contemplated by Congress, in the event of a successful constitutional challenge to the denial of an exemption, is illustrated in *National Alliance v. United States*, 81-1 U.S.T.C. ¶ 9464 (D.D.C. 1981) (where regulation's definition of "educational" void for vagueness, IRS determination that plaintiff not entitled to tax exemption was vacated). *See also Basic Unit Ministry of Schurig v. Comm'r*, 670 F.2d 1210, 1211 (D.C. Cir. 1982) (explaining denial of unusual relief under § 7428).

(Juris. St. at 11.) Because the tax code is of such complexity, and the Court's decision has thrown into question the constitutionality of so many of its provisions acting in concert, the remand order does not pose a simple question of whether an equal protection violation arising from an underinclusive statute should be remedied either by extension or by invalidating the entire scheme. Instead, it contemplates a major and unprecedented restructuring of the tax code's treatment of exempt organizations. As this Court emphasized in *Califano v. Westcott*, 443 U.S. 76, 93 (1979), a proposed remedy which "would involve a restructuring of the Act" should not be undertaken lightly. *See also Welsh v. United States*, 398 U.S. 333, 366-67, n.18 (1970) (Harlan, J., conc'g). Recognizing that, in remedying equal protection violations a court "risks infringing legislative prerogatives," the Court in *Westcott* rejected the effort by the Massachusetts Commissioner of Welfare to obtain a remedial order that would have involved such a restructuring of the AFDC-UF program.[20] The Court specifically noted that the Commissioner's proposed restructuring "would pose definitional and policy questions best suited to legislative or administrative elaboration." 443 U.S. at 93.

As shown above in Part I, Congress made a deliberate decision to impose lobbying restrictions only on

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[20] The Court there found that a provision authorizing AFDC benefits where the father was unemployed, but not where the mother was unemployed, could not be sustained. The District Court's order, extending the operation of the statute to include unemployed mothers as well as unemployed fathers, was upheld by the Court, over the objections of four Justices who would have simply invalidated the entire program and left it to Congress to determine how it wished to proceed in view of the finding of unconstitutionality. The majority, however, rejected a suggestion by the State that the order should be modified to provide for payments only where the principal breadwinner (defined without regard to sex) had become unemployed. The Court, while noting that such a provision might be more consistent with the legislative purpose, rejected it on the grounds that it would have involved rewriting of the statute prohibited to the judiciary. *Westcott, supra*, 443 U.S. at 92-94.

§ 501(c)(3) organizations. As the hearings in the 1970's on § 501(h) made clear, Congress was aware that it was legislating in an area affecting First Amendment rights. *See, e.g.*, Hearings 1976, *supra* note 6, at 61. Particularly where such rights are at issue, a court should be loath to override legislative judgment, where the effect of its ruling would be to extend qualifications on otherwise protected activities rather than to remove them. *See United States v. Robel*, 389 U.S. 258, 277-78 (1967) (Brennan, J., conc'g).

This caution is reinforced by the very cases cited by the Court of Appeals in support of its remand order—none of which support its assertion that this Court has "recognized [that] in certain situations benefits may be taken way from a preferred group in order to cure unconstitutionally unequal treatment even if that group is not before the court." App. 75a.[21] Indeed, where stat-

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[21] In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), having found a denial of equal protection, the Court struck down the sterilization statute there at issue; it specifically declined to determine whether its unconstitutionality could be cured by extending the category of crimes for which sterilization would be inflicted. *Id.* at 543. Similarly, in *Welsh v. United States*, 398 U.S. 333 (1970), where the Court reversed the conviction of a conscientious objector on the ground that the statute, by requiring a religious belief, was unconstitutionally underinclusive, the Court's opinion nowhere suggests that an appropriate remedy might be to strike down the entire conscientious objector program. Justice Harlan, in a concurring opinion, alluded to the possibility that an underinclusive statute could be cured by invalidating altogether the benefit it provided, but concluded that the Court there did not have such a choice because a longstanding congressional policy would be undermined. *Id.* at 361, 366-67. *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), involved no unconstitutional statute, but an attack by two banks on the discriminatory administration of a state tax provision which resulted in lower taxes on the banks' competitors. The sentence relied on by the Court of Appeals from the opinion in that case, *see* App. 75a, when read in context, does not refer to any issue of remedy at all, but rather is a simple statement that petitioners there would not have had any

utes imposing restrictions on a particular group have been invalidated on grounds of under-inclusiveness, this Court has followed the practice of striking down the restrictions applied to the complaining party, rather than judicially extending them to a larger group. *See e.g., Skinner v. Oklahoma, supra*, 316 U.S. at 543; *Williams v. Rhodes*, 393 U.S. 23 (1968). Similarly, statutes providing governmental benefits found to discriminate by virtue of under-inclusiveness, have consistently been extended to cover those complaining that they were unfairly excluded. *See e.g., Califano v. Westcott*, 443 U.S. at 90-91 and cases cited therein. A number of reasons for this consistent practice can be identified. First, for a court to deprive a class of persons of a benefit Congress has already sought to confer (or, *a fortiori*, to impose on such persons a restriction on freedom that Congress has not sought to impose), particularly where they are not parties to the litigation, plainly implicates due process considerations not occasioned either by an extension of the benefit or a removal of the restriction.[22] Second, the courts have recognized the paramount need, in remedying equal protection violations, to do as little "rewriting" of legislation as possible. *Cf. Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964).[23]

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claim of discriminatory treatment in the first place if the tax burdens had been equalized, either by increase of their competitors' taxes or decrease of their own.

[22] As this Court has repeatedly made clear, the peculiar authority of courts arises from their jurisdiction over the particular parties whose rights and interests are being adjudicated. *See Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

[23] In addition, for the courts to begin *extending* restrictive legislation complained of by members of the restricted class would undercut the predicate for standing—the existence of an injury redressable by the relief sought. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). TWRW did not in this case complain that other organizations were allowed to lobby; it complained that it was not. To sustain the remedial order contemplated by the Court of Appeals would entirely divorce the constitutional prerequi-

As has been observed in a different context, "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate [and the Constitution] . . . Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should [be] presented and considered." *United States v. Robel*, 389 U.S. at 276 (Brennan, J., conc'g). *See also Califano v. Westcott*, 443 U.S. at 95-97 (Powell, J., conc'g and diss'g in part) (it is the duty and function of the legislature to review programs in which an unconstitutionality has been found and to make appropriate changes therein). Since there was substantial sentiment in the 94th Congress for elimination of lobbying restrictions on § 501(c)(3) organizations altogether, *see, e.g.*, Hearings 1976, *supra* note 6, at 57, and since Congress has consistently acted to recognize the special role of veterans organizations, it would surely be hazardous for a court to seek to predict what choices Congress would make if remedial legislation were necessary.

Given the complexity of the tax code, moreover, and the interaction of its numerous provisions to produce the alleged unconstitutional discrimination here, the remand order of the Court of Appeals virtually requires the District Court, in violation of the basic constitutional principle of separation of powers, to engage in legislative functions. Instead of affording the most simple and equitable remedy of a declaratory judgment in favor of TWRW's exemption application, the District Court would not only have to resolve whether to impose lobbying restrictions on veterans organizations, but would have to resolve difficult issues on how best to accomplish this, for no single provision in the tax code can simply be struck so as to achieve this result. It is difficult to imagine a set of choices more redolent of policy concerns com-

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site of standing to sue from any limits on the courts' remedial jurisdiction and thus pose further dangers of the courts invading the legislative prerogative.

mitted under the Constitution to the Congress.[24] And on these issues, as well, it would be difficult in advance of legislative hearings to predict Congress' choices.

What does seem clear, however, is that in this case, unlike those described above, there is a substantial reason to believe that, in enacting § 7428, Congress did *not* intend to permit the courts unfettered discretion to engage in wideranging, remedial restructuring of the tax code.

CONCLUSION

For all these reasons, probable jurisdiction should be noted.

Respectfully submitted,

* MITCHELL ROGOVIN
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON

ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 466-6464

* Counsel of Record

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[24] Would, for example, the district court impose a "no substantial lobbying" requirement, modeled on that found in § 501(c)(3), on veterans organizations seeking to qualify as exempt organizations under §§ 501(c)(4) or (c)(19)? Would it instead insert such a requirement in the deductibility provisions, such as § 170? Would it make available a § 501(h) option for veterans organizations, and if so, would that be a condition of exempt status or of deductibility? Should veterans organizations' lobbying be specifically restricted in subject matter, instead of or in addition to quantitative proposals?